

***United States Court of Appeals
for the Second Circuit***



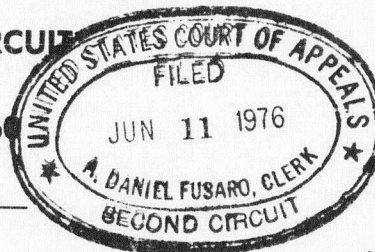
APPENDIX

76-6060

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6060



CONNECTICUT NATIONAL BANK, A. D. SLAVITT,
and CHARLES SALESKY, Executors

of the Will of

FRANK H. JAMES, Deceased,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

APPENDIX

FRANK W. MURPHY,
Slavitt, Connery & Vardamis,
618 West Avenue,
Norwalk, Connecticut, 06852.

PAGINATION AS IN ORIGINAL COPY

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

-la-

JON

B 831

Jury demand date:

D. C. Form No. 106 Rev. U. S. Court of Appeals #76-6060

TITLE OF CASE		ATTORNEYS	
		For plaintiff:	
CONNECTICUT NATIONAL BANK, ABRAHAM D. SLAVITT, and CHARLES SALESKY, EXECUTORS OF THE ESTATE OF FRANK H. JAMES, Deceased		Frank W. Murphy Slavitt & Connery & Vardamis 618 West Ave. Norwalk, Conn. 06852	
V.			
UNITED STATES OF AMERICA			
		For defendant:	
		Peter C. Dorsey U. S. Atty. Harold James Pickerstein Chief Asst. U. S. Atty. 915 Lafayette Blvd. P.O. Box 1824 Bridgeport, Conn. 06604 New Haven, Conn. 06508	
		Of Counsel:	
		Michael von Mandel Trial Attorney, Tax Division Department of Justice Washington, D. C. 20530 Tel. # (202) 739-3583	
		Jerome Fink Acting Chief Refund Trial Section No. 1 Tax Division Dept. of Justice Washington, D. C. 20530	
STATISTICAL RECORD	COSTS	DATE	
J.S. 5 mailed	Clerk	1973 8/7/73	S
J.S. 6 mailed	Marshal	1976 3/31	GF
Basis of Action: Federal Estate Tax Refund	Docket fee	4/9	Slavitt & Connery APPEAL \$5.00
	Witness fees		Deposit GF100869 \$5.00
Action arose at: \$22,802.00	Depositions		

DATE	PROCEEDINGS	Date Order Judgment A
1973		
8/7	Complaint, filed.	#1
8/7	Appearance of Frank W. Murphy, Esq., entered for plaintiffs.	#2
8/7	Summons issued and together with attested copies of same, copies of Complaint, Form 285 (1), forwarded to Marshal for service.	
8/13	Marshal's Return Showing Service on U.S. Atty. filed. (Summons & Complaint) Registered Mail Receipt #102772 (2 copies of summons and complaint mailed registered mail, return receipt requested to Atty. General of U.S.)	#3
8/15	Reg. Return Receipt No. 102772, filed. Dept. of Justice, Adm. Div., E. L. Lytle.	#4
8/24	Notice to Clerk, filed.	#5
10/11	Answer, filed by defendant.	#6
10/25	Placed on Trial List. (Notice to Counsel re: Trial List sent this date)	
11/16	Per Pre-Trial Calendar of AHL: Scheduled for pre-trial conference at 2:15 p.m. on 11/21/73.	
11/28	Pre-Trial Calendar of AHL: Pre-Trial Conference scheduled for 11/21/73 marked: "Off".	
1974		
6/18	Pretrial Memorandum, filed by plaintiffs.	#7
6/18	Pretrial Memorandum for the Defendant, filed.	#8
6/21	PRETRIAL ORDER, filed and entered. Latimer, M. So Ordered. Newman, J. M-6/21/74 (Date of Conference: May 28, 1974) Copies to counsel, AHL, JON, M.O'Connell, New Haven, Conn.	#9
8/28	Defendant's Motion for Summary Judgment, filed.	#10
8/28	Memorandum in Support of Defendant's Motion for Summary Judgment, filed.	#11
9/16	* Plaintiffs' Motion for Summary Judgment, filed.	#12
9/16	Plaintiffs' Brief in Support of Motion for Summary Judgment (Index to Brief), filed.	#13
9/16	Plaintiffs' Brief in Support of Motion for Summary Judgment, filed.	#14
9/16	Affidavit (William A. Nothnagle, Jr.) in Support of Plaintiffs' Motion for Summary Judgment, filed.	#15
9/25	Defendant's Reply Memorandum in Support of Its Motion for Summary Judgment, filed.	#16
10/3	Request that oral arguments be continued to 10/31/74 for convenience of counsel for the Government, endorsed: "Request granted, subject to assignment conflicts hereafter." Latimer, M. M-10/3/74 (per letter dated 9/27/74 from Jerome Fink, Acting Chief, Refund Trial Sec. 1 to Latimer, M.) Copies to counsel.	

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order Judgment
1974		
10/22	Defendant's Motion to Vacate Reference to the Magistrate, filed. <i>10/22/74</i>	
10/22	Memo. of deft. in Support of its Mtn. to Vacate Reference to Magistrate, filed.	
10/24	Defendant's Supplemental Reply Memorandum in Support of its Motion for Summary Judgment, filed. <i>10-24-74</i>	
10/25	Defendant's Motion for Summary Judgment, endorsed: "Motion hearing now scheduled before the undersigned for 10/31/74 continued pending ruling by Judge Newman on defendant's intervening 'motion to vacate reference to the magistrate'." Latimer, M. M-10/29/74. Copies to counsel of record.	
10/25	Plaintiffs' Motion for Summary Judgment, endorsed: "Motion hearing now scheduled before the undersigned for 10/31/74 continued pending ruling by Judge Newman on defendant's intervening 'motion to vacate reference to the magistrate'." Latimer, M. M-10/29/74. Copies to counsel of record.	
10/31	Plaintiffs' Memorandum on Motion to Vacate Reference to the Magistrate, filed.	
11/5	Defendant's Motion to Vacate Reference to the Magistrate, endorsed: "Motion to Vacate Reference Denied. Arnold V. Weinberger, Civ. No. B-369 (D. Conn. June 24, 1974). Motion for Certification Pursuant to 28 U.S.C. Sec. 1292(b) Denied. Newman, J. M-11/5/74. Copies to counsel. <i>11-7-74</i>	
12/9	Per Misc. Cal. of A.H.L. 1. Defendant's Motion for Summary Judgment; 2. Plaintiff's Motion for Summary Judgment - No. 1 and 2 Decision Reserved. Court 3:25 to 4:17 p.m. Stewart, Court Sec'y. M-12/10/74.	
12/27	Sound Recording of hearing on Defendant's Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment held on 12/9/74 before Latimer, M., in New Haven, filed in Bridgeport.	
1976		
3/1	Ruling on Cross-Motions for Summary Judgment, filed and entered. "...the underlying tax determinations having been correctly made and pltfs. not entitled to refund, deft.'s motion for summary judgment is granted and pltfs.' cross-motion denied. Latimer, M., So Ordered, Newman, J. M-3/3/76. Copies to counsel and to TEC, MJB, RCZ, JON, JEL, AHL, FOE, U. Conn. Law Review.	
3/3	Judgment, filed and entered. Deft.'s motion for summary judgment is granted and pltfs.' cross-motion is denied and action is dismissed. Markowski, C. M-3/3/76. Copies to counsel.	
3/31	Plaintiffs' Notice of Appeal from Judgment, filed. Copies to all counsel of record.	
3/31	Plaintiffs' Personal Bond on Appeal Secured by Cash Deposit (\$250.00 - Slavitt, Connery & Vardamias Check #9397), filed.	
3/31	Civil Appeals Management Plan and Forms C and D handed Atty. Thomas Maxwell for Atty. Murphy.	
3/31	Certified copies of Docket Entries and Notice of Appeal along with Personal Bond on Appeal (cert. copy) forwarded Clerk, U. S. Court of Appeals, Cert. Mail #827978.	
4/5	Cert. Mail Receipt #827978, filed. (Signature illegible)	

CONNECTICUT NATIONAL BANK,
ABRAHAM D. SLAVITT, and
CHARLES SALESKY, EXECUTORS
OF THE ESTATE OF FRANK H. JAMES,
DECEASED,

VS

Defendant

[illegible]

CIVIL ACTION FILE NO.

COMPLAINT

(FILED AUGUST 7, 1973)

1. The plaintiffs have been duly appointed and qualified as Executors under the Will of Frank H. James, late of Norwalk, deceased. The plaintiffs bring this action against the United States of America to recover estate taxes erroneously and illegally assessed and collected by the defendant from the plaintiffs. Jurisdiction is conferred on this court by 28 USC, Section 1346(a)(1), and 28 USC, Section 1340.

2. The said Frank H. James died a resident of Norwalk, Connecticut, on September 13, 1969. He left a Last Will and Testament, which was duly admitted to probate in the Probate Court in the District of Norwalk, to which jurisdiction in that behalf belongs, and on October 10, 1969, letters testamentary were duly issued out of said Court to the plaintiffs, CONNECTICUT NATIONAL BANK, ABRAHAM D. SLAVITT, and LOUIS A. SHEA, who duly qualified

as Executors of said Will. Subsequently, the said Louis A. Shea died, and his successor executor, duly appointed by the Probate Court for the District of Norwalk, is the plaintiff, CHARLES SALESKY. The plaintiffs, CONNECTICUT NATIONAL BANK, ABRAHAM D. SLAVITT and CHARLES SALESKY, have all been duly qualified as Executors of said Will, and are still acting in their capacity as such Executors.

3. The plaintiffs have a just claim against the defendant for \$32,808.90, together with interest as provided by law, which sum was paid by the plaintiffs, as Executors of said estate, to the defendant through the duly appointed, qualified and acting District Director of Internal Revenue at Andover, Massachusetts, as hereinafter set forth. The claim is founded upon the Federal Estates sections of the Internal Revenue Code of 1954, in particular Section 2055(a), and Section 2056 (26 USC 2055(a) and 26 USC 2056).

4. Prior to September 1, 1971, the plaintiffs filed the Federal Estate Tax Return of said estate showing a tax of \$37,064.20 which tax was paid with the Return. In filing the Federal Estate Tax Return, a charitable deduction for the remainder of the trust created by Article Fifth of the Will, in the amount of \$398,276.05 was claimed. In addition, marital deduction of \$36,000 was claimed, based in part, upon a widow's allowance of \$30,000 ordered by the Probate Court for the District of Norwalk.

5. The claimed charitable deduction was disallowed by the Internal Revenue Service on the ground that the trustees' power to invade the principal of the trust created under Article Fifth of the deceased's Will provided no standard for invasion, and thus a recalculation of the charitable deduction was warranted based upon the life expectancy of the two life tenants. The recalculation purported to be based upon Section 2055 of the Internal Revenue Code of 1954. As a result of the disallowance by the Internal Revenue Service, the amount of the charitable deduction was reduced by \$79,124.87, to provide for a charitable deduction of \$319,151.18.

6. The claimed marital deduction was disallowed by the Internal Revenue Service on the ground that the widow's allowance of \$30,000 did not qualify for the marital deduction under Section 2056 of the Internal Revenue Code of 1954. Consequently, the total marital deduction was reduced by \$30,000 to \$6,000.

7. On November 12, 1971, a notice of deficiency in the amount of \$30,106.34 in the amount of the tax was mailed to the plaintiffs, based upon the calculation set forth in the two immediately preceding paragraphs.

8. The plaintiffs, under threat of said deficiency and to avoid additional interest, duly paid said deficiency of \$30,106.34, plus interest in the amount of \$2,702.56 for a total payment of \$32,808.90, which payment was made on or about

July 6, 1972 to the District Director of Internal Revenue, Andover, Massachusetts.

9. On or about November 2, 1972, plaintiffs filed Form 843, its claim for refund of the payment of \$32,808.90, with the Internal Revenue Service, a copy of which is attached hereto as Exhibit A.

10. On March 22, 1973, plaintiffs filed Form 3363, Acceptance of Proposed Disallowance of Claim for Refund or Credit, and Form 2297, Waiver of Statutory Notification of Claim Disallowance, with the Internal Revenue Service at its request.

11. The denial of the charitable deduction as set forth herein was erroneous because the language of the Will provides an ascertainable standard for invasion of the trust principal, and the possibility of such invasion was so remote as to be negligible. At the time of the decedent's death, his wife and brother were both in their seventies, their needs were well established, and their own separate estates were capable of satisfying their ordinary expenses without any necessity of invasion of principal.

12. The disallowance of the widow's allowance was erroneous in that said widow's allowance qualified for the marital deduction pursuant to Section 2056 of the Internal Revenue Code of 1954, since it is a vested right under State Law, and must be recognized as such under the Internal Revenue Code.

13. No part of the sum claimed has been refunded to the plaintiffs.

WHEREFORE, the plaintiffs demand judgment against the defendant, THE UNITED STATES OF AMERICA, for the sum of \$32,808.90, together with interest as provided by law.

THE PLAINTIFFS

By _____

Frank W. Murphy
SLAVITT & CONNERY
618 West Avenue
Norwalk, Connecticut

(EXHIBIT OMITTED)

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

CONNECTICUT NATIONAL BANK,)
Abraham D. Slavitt, and)
Charles Salesky, Executors of)
the estate of Frank H. James,)
deceased)

Plaintiffs)

v.)

UNITED STATES OF AMERICA,)

Defendant)

CIVIL ACTION NO. B 831

A N S W E R

Comes now the defendant, the United States of America, by its attorney, Stewart H. Jones, United States Attorney for the District of Connecticut, answers the complaint as follows:

1. Admits the allegations contained in paragraph 1 of the complaint, except denies that any taxes were erroneously and illegally assessed and collected by the defendant from the plaintiff and admits that if jurisdiction exists, it exists by virtue of Title 28, United States Code, Section 1346(a)(1).

2. Admits the allegations contained in paragraph 2 of the complaint.

3. Denies the allegations contained in paragraph 3 of the complaint, except admits that plaintiffs as executors of the estate paid \$32,908.90 to the defendant.

4. Admits the allegations contained in paragraph 4 of the complaint, except denies that the charitable and marital deductions are allowable under the Internal Revenue Code of 1954.

5. Admits the allegations contained in paragraph 5 of the complaint, except avers with regard to the first sentence of paragraph 5, that only \$79,124.87 of the charitable deduction was disallowed.

6. Admits the allegations contained in paragraph 6 of the complaint, except avers with regard to the first sentence of paragraph 6, that only \$30,000 of the marital deduction was disallowed.

7. Admits the allegations contained in paragraph 7 of the complaint, except avers that the letter of November 12, 1971, mailed to the plaintiffs was a proposed notice of deficiency or 30 day letter.

8. Admits the allegations contained in paragraph 8 of the complaint.

9. Admits the allegations contained in paragraph 9 of the complaint, except denies each and every allegation contained in said claim for refund marked Exhibit A not otherwise admitted herein.

10. Admits the allegations contained in paragraph 10 of the complaint.

11. Denies the allegations contained in paragraph 11 of the complaint.

12. Denies the allegations contained in paragraph 12 of the complaint.

13. Admits the allegations contained in paragraph 13 of the complaint.

WHEREFORE, having answered each and every allegation in the complaint, defendant demands judgment in its favor with costs to be paid by plaintiffs.

United States Attorney

Of Counsel:

Michael von Mandel
Trial Attorney
Tax Division
Department of Justice
Washington, D. C. 20530
202-739-3538

(CERTIFICATION OF SERVICE OMITTED)

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

CONNECTICUT NATIONAL BANK,)
ABRAHAM D. SLAVITT, and)
CHARLES SALESKY, Executors)
of the ESTATE OF FRANK H.)
JAMES, Deceased,)

Plaintiffs)

v.)

CIVIL ACTION NO. B 831

UNITED STATES OF AMERICA,)

Defendant)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, United States of America,
by its attorney, Steward H. Jones, United States Attorney
for the District of Connecticut, and moves that judgment
be entered in its favor dismissing the complaint herein
with prejudice pursuant to Rule 56 of the Federal Rules of
Civil Procedure on the ground that resolving all questions
of fact in favor of the plaintiff the defendant is still
entitled to judgment as a matter of law, all of which is
set out in detail in the defendant's memorandum in support
of its motion and attached affidavit submitted herewith.

United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

CONNECTICUT NATIONAL BANK)
ABRAHAM D. SLAVITT, and)
CHARLES SALESKY, Executors)
of the ESTATE OF FRANK H.)
JAMES, Deceased,)

Plaintiffs)

v.)

CIVIL ACTION NO. B 831

UNITED STATES OF AMERICA,)

Defendant)

AFFIDAVIT IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

DISTRICT OF COLUMBIA) S.S.:
CITY OF WASHINGTON)

MICHAEL von MANDEL, being first duly sworn, deposes
and says:

I am the attorney in the Tax Division of the United
States Department of Justice to whom this case is assigned.
The records and files of the Department of Justice and
those of the Internal Revenue Service pertaining to this
case are in my possession.

I have examined those files and records and state that
the following attached copies of records are true and
correct:

1. The Last Will And Testament of Frank H.
James with attached Codicil. These documents are
marked Exhibit A and consist of 14 pages; and

2. The Probate Court order of Judge Alfred Santaniello dated December 29, 1969. This document is marked Exhibit B and consists of one page.

Michael von Mandel
MICHAEL von MANDEL

Subscribed and sworn to before me this 23rd
day of August, 1974.

Therese Jean
Notary Public

My commission expires: July 14, 1978

(EXHIBITS OMITTED, Will, Codicil and Probate Court
Order included in Appendix at Pages 26a to 40a)

Defendant

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

2. Order of the Probate Court dated December 29, 1969.
(Exhibit B).

3. Affidavit of William A. Nothnagle, Jr.
4. Brief in Support of Motion for Summary Judgment.

THE PLAINTIFFS,

By

Frank W. Murphy
SLAVITT & CONNERY 58789
618 West Avenue
Norwalk, Conn. 06852
Their Attorney

CERTIFICATION OF SERVICE

I, Frank W. Murphy, attorney for the Plaintiffs, hereby certify that on the 13th day of September, 1974, I served a copy of this motion and the accompanying brief on Michael vonMandel, U. S. Department of Justice, Washington, D. C., and Peter C. Dorsey, 114 Church Street, New Haven, by depositing a copy in the United States mails, postage prepaid, as indicated above.

Frank W. Murphy
Attorney for Plaintiffs

(EXHIBITS OMITTED, Affidavit of William A.
Nothnagle, Jr. included in Appendix at
Page 17a)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CONNECTICUT NATIONAL BANK,
ABRAHAM D. SLAVITT and
CHARLES SALESKY, EXECUTORS,
ESTATE OF FRANK H. JAMES,

Plaintiffs

VS.

UNITED STATES OF AMERICA,

Defendant

CIVIL ACTION NO. B-831

AFFIDAVIT IN SUPPORT
OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF CONNECTICUT)
COUNTY OF FAIRFIELD)

)ss. Bridgeport September 12, 1974

WILLIAM A. NOTHNAGLE, JR., being duly sworn, deposes
and says:

1. I am a Trust Officer of the Connecticut National Bank, and I am in charge of the administration of the Trust Funds and funds of the estate of Frank H. James. The Connecticut National Bank, as one of the co-Executors and co-Trustees administers the trust funds of the estate of Frank H. James, deceased. I was the Trust Officer in charge of this account

during all times mentioned herein. I have personal knowledge of the matters hereinafter referred to, and make this Affidavit in Support of the Plaintiffs Motion for Summary Judgment.

2. Frank H. James died a resident of Norwalk, Connecticut on September 13, 1969. He left a Last Will and Testament, a copy of which was duly admitted to probate in the Probate Court for the District of Norwalk.

3. On October 10, 1969, letters testamentary were duly issued to the Executors, Connecticut National Bank, Abraham D. Slavitt, and Lewis Shea, who duly qualified as Executors of said Will. Subsequently, the said Lewis Shea died and his successor executor is the plaintiff Charles Salesky. Executors have all duly qualified and are still acting in their capacity as Executors.

4. On or about December 3, 1970, the Executors filed a Federal Estate Tax Return and paid said taxes. In filing the Federal Estate Tax Return, a charitable deduction for the remainder of the trust created by Article V of the Will in the amount of \$398,276.05 was claimed. The District Director of the Internal Revenue Service disallowed a portion of the claimed charitable deduction in the amount of \$79,124.87, based upon certain powers granted to the Executors and Trustees under the Will.

5. In filing said Federal Estate Tax Return, a marital deduction of \$36,000.00 was claimed. This claim was based in part upon the widow's allowance of \$30,000.00 ordered by the Probate Court for the District of Norwalk. The District Director of the

Internal Revenue Service disallowed the marital deduction for the amount of the widow's allowance of \$30,000.00.

6. On November 12, 1971, a notice of deficiency in the amount of \$30,106.34 in the amount of the taxes was mailed to the Executors, based upon the calculation set forth in the two immediately preceding paragraphs.

7. The Executors, under threat of said deficiency and to avoid additional interest, duly paid said deficiency of \$30,106.34, plus interest in the amount of \$2,702.56 for a total payment of \$32,808.90, which payment was made on or about July 6, 1972 to the District Director of Internal Revenue, Andover, Massachusetts.

8. I have personal knowledge concerning the decedent's wife, Ada T. James, and can state the following with regard to her, and her personal circumstances:

(a) The decedent's wife, Ada T. James was born on November 12, 1890, and she is presently 83 years of age. Her life expectancy at the date of decedent's death was 5.11 years, and today is 3.39 years.

(b) At the time said decedent drew his Will, and at the time of his death, the said widow was confined to an institution, to wit: Fairfield Hills Hospital, Newtown, Connecticut, and had been institutionalized for some period of time. Thus, her expenses and needs had been fixed for quite some time. Shortly after the death of the decedent, she was transferred to a convalescent home where she receives regular nursing care and the amount needed for her monthly expenses is fixed.

(c) At the time of the decedent's death, and at present, Mrs. James had a personal estate and income separate and apart from the trust. At the present time, she is confined to a nursing home in Torrington, Connecticut, and lives a quiet serene life and her income from all sources greatly exceeds her expenditures. During the period of time from the date of the decedent's death until the present, the trust has accumulated income because Mrs. James' personal needs were far below the income of the trust.

(d) Mrs. James is presently at the Adams House Health Care Center, 80 Fern Drive, Torrington, Connecticut. The annual cost of her care and treatment at Adams House is \$8,400, and that figure has remained substantially the same over a number of years. In addition, a relative who lives near by is given \$200 per month as an allowance for Mrs. James. The relative buys various personal items and sundries for Mrs. James at her request. There is no prospect that Mrs. James will be released from the hospital.

(e) At the present time, separate assets of Mrs. James in a custody account at the Connecticut National Bank total approximately \$55,000. In addition, the trust under the will of Frank James has been partially established and is funded at \$285,000. In addition, there is the sum of principal in the amount of \$130,000 reserved from the undistributed portion of the estate for the trust for the benefit of Mrs. James. Thus, the total corpus of the trust, at the present time, is \$465,000. The bank, in managing the funds, assumes an annual rate of 5%, or in this case, approximately \$23,000.

LAW OFFICES
BLAVITT & CONNERY
111 WEST AVENUE
TORRINGTON, CONN.

(f) Since the amount expended for the benefit of Mrs. James out of income on an annual basis is less than one-half of the anticipated return on the principal of the trust, the bank does not anticipate the necessity of any invasion of the principal for any purpose. In addition, the principal of the trust has been increased by virtue of additions of undistributed income as per the authority granted under the Will. During the last accounting period ending July 31, 1973, \$14,802.81 was transferred from income to principal of the trust. The accumulations during each accounting period are attached hereto as an appendix.

9. I know the decedent's brother, William R. James, and I am familiar with him and his circumstances, and can state the following:

(a) The decedent's brother, William R. James, was born on January 24, 1898, and is presently 76 years of age. His life expectancy at the time of the decedent's death was 8.0 years and today is 5.88 years.

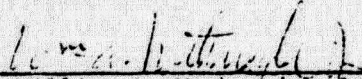
(b) William James resides at 72 Pratt Street, Winsted, Connecticut, and leads a quiet, reclusive life. According to

information given to the bank, he has substantial assets and income available which are more than enough to meet his personal needs. However, the bank pays him \$3,600 per year from income, at the rate of \$300 per month. The amount set aside for the corpus of the trust is \$95,000, and the sum of \$60,000 from the undistributed portion of the estate is earmarked at \$60,000. Thus, the trust principal is approximately \$155,000 as of the present date. The bank assumes a 5% return, which would generate \$7,750 per year on the present trust corpus. Once again, undistributed income is added to the trust and is accumulated as principal. The accumulations during ~~each~~ accounting period are attached hereto as an appendix.

10. There never has been an invasion of principal by the trustee and there is no likelihood of the necessity of an invasion, because of the amount of the income generated.

11. In administering this trust, the bank, based upon prudent management policies, determined that the income was more than sufficient to meet the requirements for distribution of income under the will and has been able to accumulate a considerable amount for principal. In my opinion, as the officer managing the trust, there is no prospect of an invasion of the trust principal as permitted by the Will for the benefit of either Ada James or William James, and the possibility of the trustees invading the trust corpus is so remote as to be negligible

Dated at Bridgeport, Connecticut this 12th day of September, 1974.

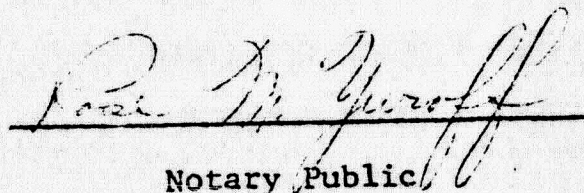

William A. Nothnagle, Jr.
Trust Officer, Connecticut
National Bank

LAW OFFICE
LAVITT & CONNERY
100 STATE STREET
BRIDGEPORT, CT 06610

STATE OF CONNECTICUT)
)ss Bridgeport
COUNTY OF FAIRFIELD)

On this the 12th day of September, 1974, before
me, Rose M. Yuroff , the undersigned officer,
personally appeared, WILLIAM A. NOTHNAGLE, JR., who acknowledged
that he executed the foregoin instrument for the purposes therein
contained.

IN WITNESS WHEREOF, I hereunto set my hand and
official seal.


Notary Public

A P P E N D I X A

Undistributed income, Estate Frank H. James #3775

Accounting Period Ending:

December 31, 1969	\$ 8,820.48
December 31, 1970	26,815.17
December 31, 1971	12,947.14
Decemoer 31, 1972	11,822.77
Decemoer 31, 1973	13,076.77
December 31, 1974	<u>9,071.11</u>

A P P E N D I X B

Undistributed income, Trust f/b/o Ada B. James
u/w/o Frank H. James #3920

Accounting Period Ending:

August 31, 1971	\$ 21,939.38
August 31, 1972	16,914.68
August 31, 1973	- 0 -

Transfer to savings account for
Ada James and not withdrawn to date

August 31, 1971	11,000.00
August 31, 1972	5,408.76
August 31, 1973	<u>14,802.81</u>

A P P E N D I X C

Undistributed income, Trust f/b/o
William R. James u/w/o Frank H. James #3921

Accounting Period Ending:

August 31, 1971	\$ 8,085.36
August 31, 1972	4,203.77
August 31, 1973	<u>1,253.14</u>

LAST WILL AND TESTAMENT ,

OF

FRANK H. JAMES

I, FRANK H. JAMES, of the City of Norwalk, County of Fairfield and State of Connecticut, being of sound and disposing mind and memory, and realizing the uncertainty of life, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all former Wills and Codicils by me heretofore made.

FIRST:

I direct that my expenses from my last illness, my funeral expenses and my just debts and obligations of every nature, except such as shall at the time of my death be secured by mortgage, be paid by my Executors as soon after my decease as may be practical.

SECOND:

I give and bequeath to my loyal friend of many years standing, HOWARD MORRIS of Norwalk, Connecticut, if he shall survive me the sum of Five Thousand Dollars (\$5,000) to be his absolutely.

THIRD:

I give and bequeath all of my household furniture and furnishings, pictures, plates, objects of art, linens, glass, china, silver, books, jewelry, watches, clothing, automobiles and their accessories, and all other similar articles of tangible personal property which I may own at the time of my death, to my beloved wife, ADA B. JAMES, if she shall survive me, or if she shall not survive me, then I give and bequeath

the same to my brother, WILLIAM R. JAMES, if he shall survive me, but if neither my wife nor my said brother shall survive me, then I give and bequeath the same to my Trustees herein- after named, to become part of the Trust of my residuary estate as set forth in Clause FIFTH of this, my Will.

FOURTH:

I direct that all death, succession, inheritance and estate taxes that shall become payable in respect of any pro- perty or interest passing by virtue of my death, whether such property or interest passes under this Will or otherwise, shall be paid by my Executors out of my residuary estate as an expense of administration, and that the same shall not be apportioned or prorated among the beneficiaries under this Will, or those taking outside of this Will.

FIFTH:

All the rest, residue and remainder of my estate, real, personal and mixed, of every nature and kind whatsoever, and wheresoever the same may be situated, I give, devise and bequeath to my Trustees hereinafter named, IN TRUST, NEVERTHE- LESS, pursuant to the following directions and for the uses and purposes hereinafter stated:

(a) If my wife, ADA B. JAMES, and my brother, WILLIAM R. JAMES, shall both survive me, my Trustees shall divide my residuary estate (although no physical division shall be necessary) into two separate shares, one for the benefit of my wife, ADA B. JAMES, and one for the benefit of my brother, WILLIAM R. JAMES, in the following proportions:

ADA B. JAMES	75%
WILLIAM R. JAMES	25%

My Trustees shall hold, manage, invest and reinvest the property forming the corpus of this Trust, and collect the rents, interest, dividends and other income therefrom and after the payment of all usual charges and expenses of administration thereon, shall pay over or apply so much of the net income from each of said shares respectively to or for the benefit of the particular abovenamed beneficiary thereof, during their respective lives, at such time and in such amounts as my Trustees, in their sole and uncontrolled discretion, shall determine, and my Trustees shall accumulate the remaining balances of the net income not so distributed, if any, and shall add the same to the respective share upon which such income was earned, whereupon the same shall become part of the principal of said shares of this Trust for all the purposes of this, my Will.

I. If my wife shall have predeceased me, or having survived me died during the administration of my estate or of this Trust, then the above allocated share of my wife, or the then remaining principal and accrued income of the share of this Trust above allocated for her benefit, as the case may be, shall be allocated and added by my Trustees to the share of this Trust above allocated for the benefit of my brother, WILLIAM R. JAMES, if living.

II. If my said brother shall have predeceased me, or having survived me shall die during the administration of my estate or of this Trust, then the above allocated share of my brother, or the then remaining principal and accrued income of the share of this Trust above allocated for his benefit, as the case may be, shall be allocated and added by my Trustees to the share of this Trust above allocated for the benefit of my wife, ADA B. JAMES, if living.

III. If my Trustees, in their sole and uncontrolled discretion, shall at any time during the administration of the Trust created, deem it advisable to pay over or apply the principal of any of the shares to or for the benefit of the respective life income beneficiaries, then I authorize my said Trustees at any time to pay over from the principal of said respective Trusts such amounts as my Trustees shall allow but subject always to the following limitations:

(A) To or for the benefit of my wife, ADA B. JAMES, up to a maximum of Seven Thousand Five Hundred (\$7,500) Dollars during any one year, to be cumulative, but such payments shall in no event exceed in the aggregate the sum of Seventy-five Thousand (\$75,000) Dollars and this power of invasion is limited accordingly.

(B) To or for the benefit of my brother, WILLIAM R. JAMES, up to a maximum of Two Thousand Five Hundred (\$2,500) Dollars during any one year, to be cumulative, but such payments shall in no event exceed in the aggregate the sum of Twenty-five Thousand (\$25,000) Dollars and this power of invasion is limited accordingly.

(C) If my wife shall have survived me and shall desire to live in the family homestead, she is to be allowed to remain in said homestead for life. If she chooses not to remain in said homestead, or if it becomes unfeasible for her to do so, then my Trustees shall sell said house and use the proceeds thereof to maintain my wife in another house of her choosing or as rental for an apartment or to maintain her in a senior citizens' home, as the case may be.

IV. The Trusts created in the provisions of subparagraph (a) of this clause FIFTH shall terminate upon the death of the last to die of the persons named as beneficiaries

of said Trust, i.e., my wife, ADA B. JAMES, and my brother, WILLIAM R. JAMES.

V. Upon the termination of said Trust, I direct my Trustees to pay over, transfer and deliver the principal of said Trust Fund, or so much thereof as shall then remain, together with all accrued income thereon, absolutely, and free of any Trust, to the following charities, as hereinafter provided:

1. Thirty percent (30%) thereof to the Norwalk Hospital Association of Norwalk, Connecticut.
2. Ten percent (10%) thereof to the Methodist Episcopal Church of Norwalk at the corner of West Avenue and Mott Avenue in said Norwalk.
3. Ten percent (10%) thereof to the Methodist Church of Winsted, Connecticut.
4. Ten percent (10%) thereof to St. Jerome's Roman Catholic Church of Norwalk.
5. Ten percent (10%) thereof to Young Men's Christian Association of Norwalk, Inc.
6. Ten percent (10%) thereof to Young Men's Christian Association of Winsted.
7. Ten percent (10%) thereof to such Jewish temples, synagogues, charities, or institutions located within the City of Norwalk, the recipients thereof to be selected by my Trustees.
8. Ten percent (10%) thereof to such charities located within Fairfield County, Connecticut, not to exclude the above named recipients, which shall then be selected by my Trustees.

In making the selections of the charities which shall be the recipients of the above gifts, my Trustees shall select

only such charities as shall qualify for the Federal Estate Tax Charitable Deduction under the Federal Estate Tax Law in effect at the time of my decease.

SIXTH:

If my said wife, ADA B. JAMES, and my brother, WILLIAM R. JAMES, shall both have predeceased me, then I give, devise and bequeath the whole of my residuary estate to the following charities as be hereinafter provided:

1. Thirty percent (30%) thereof to the Norwalk Hospital Association of Norwalk, Connecticut.
2. Ten percent (10%) thereof to the Methodist Episcopal Church of Norwalk at the corner of West Avenue and Mott Avenue in said Norwalk.
3. Ten percent (10%) thereof to the Methodist Church of Winsted, Connecticut.
4. Ten percent (10%) thereof to St. Jerome's Roman Catholic Church of Norwalk.
5. Ten percent (10%) thereof to Young Men's Christian Association of Norwalk, Inc.
6. Ten percent (10%) thereof to Young Men's Christian Association of Winsted.
7. Ten percent (10%) thereof to such Jewish temples, synagogues, charities, or institutions located within the City of Norwalk, the recipients thereof to be selected by my Trustees.
8. Ten percent (10%) thereof to such charities located within Fairfield County, Connecticut, not to exclude the above named recipients, which shall then be selected by my Trustees.

In making the selections of the charities which shall

be the recipients of the above gifts, my Trustees shall select only such charities as shall qualify for the Federal Estate Tax Charitable Deduction under the Federal Estate Tax Law in effect at the time of my decease.

SEVENTH:

In addition to any other powers my Executors and Trustees may possess under the law, and not by way of limitation thereof, they are hereby authorized and empowered as follows:

(a) To hold and retain all or any part of my estate or Trust in the form in which the same may be at the time of my decease or at the time of the receipt thereof, as long as they may deem advisable.

(b) To invest and reinvest any funds in my estate or in the Trust in any property, real or personal, including without limitation stocks, bonds, mortgages and other securities without being limited or restricted to investments prescribed or authorized for Executors or Trustees by the laws of Connecticut or any other State, it being my intention to grant my Executors and Trustees the same broad powers of investment and reinvestment which I myself possess with respect to my own funds.

(c) To act as a director, officer, or other employee of any corporation or business in which any of my Executors or Trustees may have a personal as well as a fiduciary interest notwithstanding a possible conflict of such interests and to receive compensation as such notwithstanding the fact the he is also a fiduciary and to act in all matters concerning such corporation or business as fully as if he were independent.

(d) In respect of any securities forming part of my estate or the Trust created hereby to vote upon any proposition

or election at any meeting and to grant proxies to vote, to join in or to become a party to any reorganization, readjustment, merger, consolidation or exchange, and generally to take all action in respect to any such securities as they might or could do as the absolute owner thereof.

(e) When required to divide or distribute my estate or Trust, to make such division and distribution in kind or in money or in part kind and part money, in accordance with Clause FIFTH hereof.

(f) To engage attorneys, accountants and such other persons as they may deem advisable in the administration of my estate and the Trust, and to make such payments therefor as they may deem advisable by way of proper compensation.

(g) To exercise all power and authority including any discretion conferred in this Will after the termination and final distribution of the Trust.

(h) In the administration of my estate and the Trust to determine what constitutes income and principal and proper charges against either or both in accordance with the definition of net income as set forth in the Internal Revenue Code.

(i) In the administration of my estate or of the Trust to sell, lease, transfer, convey, exchange, mortgage, pledge, or otherwise encumber, dispose of or account for any of the property, real or personal, forming a part of my estate or of the Trust, without first obtaining permission from any Probate Court which may have jurisdiction, upon such prices, terms, conditions, credits and considerations as they in their absolute discretion may deem sufficient.

EIGHTH:

I hereby nominate, constitute and appoint my friend

LEWIS SHEA, of Fairfield, Connecticut, THE CONNECTICUT NATIONAL BANK, and my friend and attorney, A. D. SLAVITT, of Norwalk, Connecticut, as Executors and Trustees under this, my Will. It is my request and direction that my Executors and Trustees retain the law firm of Slavitt & Connery, Norwalk, Connecticut as their attorneys in all legal matters in connection with this, my Will, my estate and said Trust, and in the event of such retainer, then I direct that said A. D. SLAVITT shall not be entitled to any fees as such Executor and Trustee. I further direct that in the event THE CONNECTICUT NATIONAL BANK shall qualify as an Executor and Trustee that said LEWIS SHEA shall not be entitled to any fees as such Executor and Trustee.

In the event that A. D. Slavitt shall predecease me or fail to qualify, or having qualified should die, resign or become incapacitated during the administration of my estate or of the Trust herein established, I desire that his son, ROBERT A. SLAVITT, of Norwalk, Connecticut, be appointed in his stead in both capacities, and subject to the same prohibition with respect to fees as such Executor and Trustee in the event that Slavitt & Connery shall be retained as attorneys, as aforesaid; thereafter in the event any of the aforesaid nominees should predecease me or fail to qualify, or having qualified, should die, resign or become incapacitated during the administration of my estate or of the Trust herein established, or for any other reason a vacancy should occur in his or its office, either as Executor or Trustee, the remaining Executors and Trustees shall appoint a substitute or successor Executor or Trustee. In the event that they have failed to appoint such successor within thirty (30) days of such vacancy, or in case of any disagreement over such appointment, then in either of such events such successor shall be appointed forthwith by the

Probate Court having jurisdiction over my estate and Trust so that there will always be three (3) Executors or Trustees, as the case may be. I authorize and direct that no Executor or Trustee appointed in accordance with or pursuant to these provisions shall be required to furnish any bond or other security for the faithful performance of his or its duties. All power, authority and discretion herein conferred upon the said Executors and Trustees may be exercised by such of them as shall qualify and be acting hereunder from time to time. The majority of my Executors and Trustees shall have the power to make any decision or undertake any action or execute any documents affecting my estate or the Trust created herein, provided, however, that in the event of a difference of opinion among them, the dissenting or non-assenting Executor or Trustee shall not be responsible for any action taken by the majority pursuant to such decision.

IN WITNESS WHEREOF, I have hereunto set my hand and seal to this my Last Will and Testament and have initialed in the lefthand margin on each of the nine (9) preceding pages of this my Last Will and Testament, at Norwalk, Connecticut, this day of May, 1966.

/s/ Frank H. James L.S.
Frank H. James

Signed, sealed, published and declared to be his Last Will and Testament by the abovenamed testator FRANK H. JAMES, in the presence of us, who, in his presence and at his request, and in the presence of each other, have hereunto subscribed our names as witnesses.

<u>/s/ Eileen B. Champ</u>	of	<u>Norwalk, Conn.</u>
<u>/s/ Virginia H. Bingham</u>	of	<u>Weston, Conn.</u>
<u>/s/ Eugene M. Kimmel</u>	of	<u>Norwalk, Conn.</u>

STATE OF CONNECTICUT
COUNTY OF FAIRFIELD }

ss. Norwalk, May 11, 1966

The within-named Eileen B. Champ,

Virginia H. Bingham

AND

Eugene M. Kimmel

being duly sworn, depose and say, that they witnessed the within Will of the within-named testator, FRANK H. JAMES, and subscribed the same in his presence and at his request and in the presence of each other; that the said FRANK H. JAMES, at the time of the execution of said Will, appeared to them to be of full age and of sound mind and memory; and that he signed said Will and declared the same to be his Last Will and Testament in their presence; and that they make this affidavit at the request of said testator.

s/ Eileen B. Champ

s/ Virginia H. Bingham

s/ Eugene M. Kimmel

Subscribed and sworn to, at the request of the within-named testator, FRANK H. JAMES, the day and year above written, before me,

s/ A. D. Slavitt

Commissioner of the Superior Court

BEST COPY AVAILABLE

CODICIL TO LAST WILL AND TESTAMENT
OF

FRANK H. JAMES

I, FRANK H. JAMES, of the City of Norwalk, County of Fairfield and State of Connecticut, do hereby make, publish and declare this to be the First Codicil to my Will dated May 11, 1966.

1. I amend Paragraph SECOND of my Will, dated May 11, 1966, by adding thereto that I also give and bequeath to my friend, RUSSELL S. MILLS, of Union Avenue, Norwalk, Connecticut, if he shall survive me, the sum of FIVE THOUSAND DOLLARS (\$5,000) to be his absolutely.

2. I amend number 1 of Section V of paragraph FIFTH of my said Will, as well as number 1 of Paragraph SIXTH of my said Will, by substituting therefor the following:

"1. Ten Percent (10%) thereof to the Norwalk
Hospital Association of Norwalk, Connecticut."

3. I also amend number 8 of Section V of Paragraph FIFTH, as well as number 8 of Paragraph SIXTH of said Will, by substituting the following:

"Twenty Percent (20%) thereof to such charities
located within Fairfield County, Connecticut, not
to exclude the above named recipients, and which
shall be selected by my Trustees."

The rest of said number 8 is to remain as set out
in my said Will.

4. I add number 9 to Section V of Paragraph FIFTH, as
well as to Paragraph SIXTH of my said Will, as follows:

"9. Ten Percent (10%) thereof to the Notre Dame
Convalescent Home, presently located on West
Rocks Road in the City of Norwalk, Connecticut."

As amended by this Codicil, I hereby ratify, confirm
and republish my Will dated May 11, 1966.

IN WITNESS WHEREOF, I have hereunto set my hand and
seal this 27 day of September 1968.

Frank H. James
Frank H. James

Signed, sealed, published and declared by FRANK H. JAMES
as and for his First Codicil to his Last Will and Testament
dated May 11, 1966, in the presence of us, who at his request
and in his presence, and in the presence of each other, have
hereunto subscribed our names as witnesses and have set down our
place of residence opposite our names.

Virginia H. Bingham of *Weston, Conn.*
Eileen B. Champ of *Norwalk, Conn.*
Ellen M. Frank of *Norwalk, Conn.*

STATE OF CONNECTICUT :
COUNTY OF FAIRFIELD : ss. Norwalk
September 27, 1968

The within named Virginia H. Bingham, Eileen B. Champ
and Ellen M. Frank , being duly sworn, depose and say
that they witnessed the First Codicil to the Will of FRANK H.
JAMES, dated May 11, 1966, and subscribe the same in his presence

and at his request and in the presence of each other, and that said FRANK H. JAMES, at the time of the execution of said Codicil, appeared to them to be of full age and of sound mind and memory, and that he signed said Codicil in their presence, and that they make this affidavit at the request of said Testator.

Virginia H. Bingham
Eileen B. Champ
Edna M. Frank

Subscribed and sworn to, before me, this 27 day of
September 1968.

W. H. T.
Commissioner of the Superior Court

At a Court of Probate holden at Norwalk, within and for the District of Norwalk, on the 29th day of December, A.D., 1969.

Estate of FRANK H. JAMES, late of Norwalk in said District, deceased.

Upon the written application of Eugene M. Kimmel, guardian ad litem of Ada B. James, widow of said deceased, praying this Court for an allowance for the support of said widow during the settlement of said estate, this Court finds: that said deceased left him surviving his widow, said Ada B. James, and that an allowance ought to be made out of said estate for her support: it is therefore

ORDERED, That the sum of Two Thousand Five Hundred (\$2,500.00) Dollars per month for twelve months from the date of death of said deceased be and the same is hereby allowed to the surviving spouse of said deceased, for her support out of said estate, and said allowance shall vest in said spouse and shall not terminate with the subsequent death or remarriage of said spouse, and the executors of the will and codicil thereto of said deceased are hereby directed to pay over the amount so allowed to said widow pursuant to this order.

Alfred Santaniello,
JUDGE.

A true copy of the original order.

Attest:

Bette A. Peterson
CLERK.

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U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CONNECTICUT NATIONAL BANK,*
ABRAHAM D. SLAVITT, and,*
CHARLES SALESKY, Execu-*
tors of the Estate of,*
Frank H. James, Deceased,*
Plaintiffs,*

VS.*

CIVIL ACTION NO. B-831

UNITED STATES OF AMERICA,*
Defendant,*

RULING ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT

This is a civil action brought pursuant to 28 U.S.C. § 1346(a)(1) for refund of federal estate taxes paid by reason of partial disallowance of: (1) a charitable deduction claimed under 26 U.S.C. § 2055 for the remainder of a testamentary trust which contemplated possible diversion of trust corpus to noncharitable private use by lifetime income beneficiaries; and (2) a marital deduction claimed under 26 U.S.C. § 2056, to the extent founded on Connecticut probate court grant of a widow's allowance. On cross-motions for summary judgment, the pleadings, exhibits and affidavit on file show that there is no genuine issue of fact material to the suit's resolution, cf. Rule 56(c), Fed. R. Civ. P.

Decedent Frank H. James died a resident of Norwalk, Connecticut on September 13, 1969; his will was probated in Norwalk, and plaintiffs were appointed executors. After provision for certain specific bequests, the will directs retention

of the estate's residue in trust for the lifetime benefit of decedent's wife and brother, in proportional shares respectively of 75% and 25%, with the remainder ultimately destined for a number of charities; permitted to distribute or accumulate income as they see fit, the trustees are further authorized to invade principal to pay decedent's wife a maximum amount of \$7,500 annually and \$75,000 in the aggregate and to pay decedent's brother a maximum amount of \$2,500 annually and \$25,000 in the aggregate,

"[i]f . . . [the] Trustees, in their sole and uncontrolled discretion, shall . . . deem it advisable to pay over or apply the principal of any of the shares to or for the benefit of the respective life income beneficiaries. . . ."

Applying the rule pertinent here that deduction of the value of a charitable remainder interest under 26 U.S.C. § 2055(a)(2) "may be taken . . . only insofar as that interest is presently ascertainable, and hence severable from the noncharitable interest", Treas. Reg. § 20.2055-2(a) (1958), the government disallowed plaintiffs' charitable deduction claim to the extent it failed to reflect that power to divert principal, and such disallowance was correct because the will's language establishes no objective standard to limit the power's full use, cf. City Trust Co. v. United States, 497 F.2d 716, 718 (2 Cir. 1974).

On December 29, 1969, the probate court granted a widow's allowance application, ordering that

"the sum of Two Thousand Five Hundred (\$2,500.00) Dollars per month for twelve months from the date of death of said deceased be and the same is hereby allowed to the surviving spouse of said deceased, for her support out of said estate, and said allowance shall vest in said spouse and shall not terminate with the subsequent death or remar-

riage of said spouse, and the executors of the will and codicil thereto of said deceased are hereby directed to pay over the amount so allowed to said widow pursuant to this order".

The amount of that allowance, \$30,000, was thereafter claimed as a marital deduction as an "interest in property which . . . passed from the decedent to his surviving spouse", 26 U.S.C. § 2056(a), but such an interest generally does not qualify for the deduction when "terminable", i.e., if "on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur . . . [the interest] will terminate or fail", 26 U.S.C. § 2056(b)(1). Disallowance of this item was accordingly also proper because decedent's wife had no vested, indefeasible right to the award at the time of her husband's death.

In Connecticut, the "court of probate may allow . . . such amount as it may judge necessary for the support of the surviving spouse . . . during the settlement of the estate", Conn. Gen. Stat. § 45-250(a), and "discretion is reposed in it to determine whether to make the allowance, and, if it is made, its amount and duration", Baldwin v. Tradesmens National Bank, 147 Conn. 656, 660, 165 A.2d 331, 333 (1960). This Court earlier held the Connecticut survivor's allowance a terminable interest when the relevant statutory terms were essentially those now set forth in § 45-250(a), Second National Bank of New Haven v. United States, 222 F. Supp. 446, 449-451 (D. Conn. 1963) (Timbers, J.), rev'd on other grounds, 351 F.2d 489 (2 Cir. 1965), aff'd, 387 U.S. 456 (1967), while observing that an ensuing amendment unequivocally reciting that the "right to support of a surviving spouse shall vest in such spouse upon the death of his spouse and shall not terminate

with his subsequent death or remarriage", Conn. Public Act No. 370 (1961), "clearly makes the widow's allowance in Connecticut eligible for the marital deduction", Second National Bank, supra, 222 F. Supp. at 451, n. 16 (dictum). Still another and significantly redrawn version of the statute controls the present case; if a support allowance is currently furnished, "the court may in its discretion include in its decree", Conn. Gen. Stat. § 45-250(b), a provision -- inter alia -- that

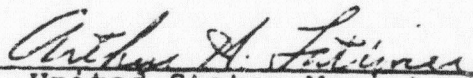
"such an allowance made for a surviving spouse shall vest in such spouse retroactively as of the moment of death of his spouse so that it will be a fixed sum certain as of said date of death and shall not terminate with the subsequent death or remarriage of the surviving spouse, such allowance to be the absolute property of the surviving spouse, or, if deceased, of the estate of such surviving spouse, without restriction as to use, encumbrance or disposition and for the purpose of this section, the right to seek such a vested allowance shall be a vested right as of the date of death of the deceased spouse"

§ 45-250(b)(3). Presumably intended in part to preserve the marital deduction, the statute falls short of the mark, for too great an element of contingency is introduced with the increased flexibility afforded the probate court. The status of the surviving spouse's allowance "interest" is to be tested by the situation presented at the time of the other spouse's death, see Jackson v. United States, 376 U.S. 503, 507-508 (1964), Allen v. United States, 359 F.2d 151, 154 (2 Cir.), cert. denied, 385 U.S. 832 (1966), and at that point perhaps the very grant of a support allowance and surely the nature of any such allowance would seem uncertain under the existing Connecticut law. Assuming of course that a need for merely pro forma court action would not be a matter of consequence,

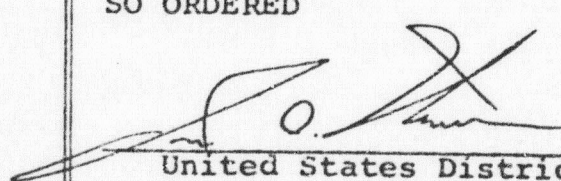
see, e.g., Estate of Green v. United States, 441 F.2d 303, 307-308 (6 Cir. 1971), it is not at all plain in Connecticut that a survivor's allowance must be granted upon request; what is plain, moreover, is that even if favorable action might be expected on any application for an allowance, and the applicant further has a "vested right" to seek a "vested allowance", the probate court has been expressly empowered by statute to exercise critical discretion in shaping the nature of the award, e.g., by including or omitting a provision that the allowance "shall not terminate with the subsequent death or remarriage of the surviving spouse". Such future contingencies are not the equivalent of legal assurance as of the moment of death.

Accordingly, the underlying tax determinations having been correctly made and plaintiffs not entitled to refund, defendant's motion for summary judgment is hereby granted and plaintiffs' cross-motion denied.

Dated at New Haven, Connecticut, this 27th day of February 1976.


United States Magistrate

SO ORDERED


United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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CLERK
U.S. DISTRICT COURT
BRIDGEPORT, CONN.

CONNECTICUT NATIONAL BANK,
ABRAHAM D. SLAVITT, and
CHARLES SALESKY, Executors
of the Estate of Frank H.
James, Deceased

VS.

CIVIL NO. B-831

UNITED STATES OF AMERICA

J U D G M E N T

This case having come on for consideration on Cross-Motions for Summary Judgment and the Court having filed its Ruling on Cross-Motions for Summary Judgment under date of March 1, 1976, granting the defendant's motion for summary judgment and denying the plaintiffs' cross-motion,

It is accordingly ORDERED, ADJUDGED and DECREED that the defendant's motion is granted and the plaintiffs' cross-motion is denied and the instant action is hereby dismissed.

Dated at Bridgeport, Connecticut, this 3rd day of March, 1976.

SYLVESTER A. MARKOWSKI, Clerk

By Vincent R. DeRosa
Vincent R. DeRosa
Deputy in Charge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FILED

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CLERK
U.S. DISTRICT COURT
BRIDGEPORT, CONN.

CONNECTICUT NATIONAL BANK,
ABRAHAM D. SLAVITT, and
CHARLES SALESKY, Executors
of the Estate of Frank H.
James, Deceased,

Plaintiffs

VS.

UNITED STATES OF AMERICA

Defendant

CIVIL NO. B-831

NOTICE OF APPEAL

Notice is hereby given that CONNECTICUT NATIONAL BANK, ABRAHAM D. SLAVITT, and CHARLES SALESKY, Executors of the Estate of Frank H. James, Deceased, hereby appeal to the United States Court of Appeals for the Second Circuit from the decision of the United States District Court entered in the above captioned proceeding on the third day of March 1976.

March 31, 1976

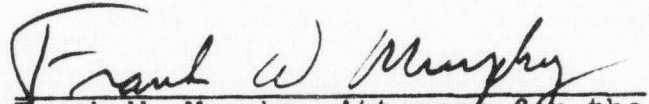
CONNECTICUT NATIONAL BANK, ET ALS

By Frank W. Murphy
Frank W. Murphy, Their Attorney
Slavitt, Connery & Vardanis
618 West Avenue
Norwalk, Connecticut 06852
(203) 838 7555

(CERTIFICATE OF SERVICE OMITTED)

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of this Brief has been made on opposing Counsel by mailing copies to Scott P. Crampton, Assistant Attorney General, Tax Division, Attention of Joseph Liegl, United States Department of Justice, Washington, D. C., by depositing copies of the same in the United States Mails, postage prepaid as indicated above.


Frank W. Murphy, Attorney for the
Plaintiffs - Appellants